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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

FRED BARKER,

Petitioner,
v.

MANCOR, CAROLINA, INC.

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED

I. **May an employer successfully employ a "direct threat" defense to an ADA claim without any objective evidence or an individualized assessment of the individual's present ability to safely perform the essential functions of the job?**

II. **Should Bi-Polar Disorder and anxiety disorder be considered mentally disabling conditions covered under the ADA?**

III. **Where adverse employment action is motivated by behavior which is symptomatic of a disability, should the Employer's action be considered to have been taken "because of" the employee's disability?**

IV. **Should Short stature (height) in males be considered as a physical disability based on social difficulties inherent in being in a class of males of short-stature?**

V. Should the Court consider Barker's argument concerning short stature in males as constituting Involuntary servitude?

VI. Should Barker's claims fall outside of South Carolina's Worker's Compensation choice of remedies exclusions?

VII. Should the provision of ineffective accommodations to a disabled person be considered a denial of reasonable accommodations under the ADA?

VIII. Should the Court should consider close proximity in time between a protected act and adverse employment action, where there is no intervening cause for the adverse employment action other than the protected act, evidence of pretext, in support of a prima facie case of retaliation?

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OPINIONS BELOW

The Court of Appeals wrote an unpublished Opinion in this case, affirming based on the reasoning in the District Court Judge's Order filed on April 24, 2002. The Opinion was four sentences long, and did not contain any discussion of the facts or legal arguments set forth in the briefs, other than the statement "We have reviewed the record and find no reversible error." The Court responded to a petition for rehearing with an Order, the complete text of which is as follows, "Appellant has filed a petition for rehearing. The Court denies the petition for rehearing."

JURISDICTION

On December 13, 2002, the Appeals Court for the Fourth Circuit affirmed the District Court's Order granting Mancor's Motion for Summary Judgment on all causes of action. The Court denied Barker's petition for rehearing on January 28, 2003. This Court Has Jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

United States Constitution, Thirteenth Amendment

STATUTORY PROVISIONS AT ISSUE

42 U.S.C. 12000, et seq.

42 U.S.C. 2000e, et seq.

STATEMENT OF THE CASE

Mr. Barker worked at Mancor for about four years as a press brake operator. Barker suffers from asthma, and several mental and emotional disorders, which are complicated by the fact that he is a male of short stature, a disability, Mr. Barker argues, in and of itself in today's society. Mr. Barker's main emotional and mental disabilities are anxiety disorder, bipolar disorder, and social phobia. As a result of his mental disorders, combined with what he perceives as a social handicap of his short stature, Barker is severely limited in his ability to interact socially, not only on a person to person basis in general, but especially in instances of interaction with women. As a result of these disorders, Mr. Barker also suffered severe sexual dysfunction, which was corrected, medically, for a time, through the use of a penile implant, but remained uncorrected while he was at Mancor.

On March 13, 1996, Barker notified Mancor of his disabilities, and again in

September of 1997, verbally and by submitting letters from his doctor, setting forth his need for reasonable accommodations. Mancor agreed to provide some of the requested accommodations, including 1) asking workers not to smoke in Barker's vicinity, and 2) allowing Barker to withdraw from his work area if a confrontation with another worker caused him to suffer severe anxiety. Barker had made Mancor management aware of the "fight or flight" autonomic nervous system response of anxiety disorder. Barker explains that the "fight or flight" response is triggered when he is forced into a confrontational situation, and described his reaction, that he could "explode like an atomic bomb," if not allowed to withdraw. The withdrawal accommodation worked well for both parties while in place. Barker did not abuse the accommodation, using it only in severe cases (only a few times in four years). Each time it was used, the time was covered by Barker's available sick or vacation time. "Sometimes he would leave, maybe two or three times he left work and came back the next day. There was one time when he left for the week and took vacation days." At all times, Mancor admits that Barker's performance and attendance was good.

As time went on, other workers began to harass Barker about his mental disabilities, calling him crazy, writing a message on a bulletin board indicating that Mr. Barker should

be taken to the local state mental health center, and poking fun at his height, mental status, and constant requests that management enforce the no smoking accommodation that Mancor had granted him. Management members did not use any "words of authority" when telling other workers not to smoke near Barker, and did not attempt to enforce the requests that were made. Supervisors were aware of a photograph of two wrestlers, a small man attacking a large man, with the caption "Fred downs Andre Boone for smoking near him… 'FEEL MY RAGE'" on it (App. C), but took no action to remove the photo or to reprimand those who put it there.

Despite Barker's more and more insistent demands that management address and stop the harassment, Mancor never took any effective remedial action. On one occasion, a co-worker named Bubba instigated a confrontation with Barker, causing a severe anxiety attack, and Barker requested permission from his supervisor to leave his work, per his reasonable accommodation. The supervisor granted the request, but, the next day, after Barker requested time off to go to retain an attorney to file a charge of discrimination, wrote Barker a disciplinary warning, and, with the blessing of the HR manager, the warning denied Barker the use of the "withdrawal" accommodation.

Barker continued to be victimized by harassment from his co-workers, who found it funny to taunt him by continuing to smoke near

Mr. Barker and see his reactions. Supervisors continued to ignore his complaints about the harassment. Feeling that his health was being threatened by the aggressive smoking (with his emotional disorders in full swing, Barker perceived the smoke as a deadly weapon), Barker then began to write his complaints on "log sheets," report forms from an obsolete project in which workers were asked to log their progress and write down any reasons for work interruptions. Though his supervisor and the HR manager agreed that writing complaints of harassment on the log sheets was not an offense warranting discipline of any kind, they wrote Barker a letter, as a sort of warning, and called him to the HR office to present it to him. Barker, suddenly faced with a very confrontational situation, began to suffer from anxiety, but explained his situation. He told Ms. Smith, the HR manager, and Curtis Block (his supervisor) that it was not fair for them to allow co-workers to taunt him and harass him, take away his ability to withdraw, and then punish him for his reactions, which were first, not drastic or dangerous, and second, a foreseeable result and symptom of his disability. Barker, upon leaving the meeting, said "y'all ain't seen anything yet," informing Mancor that his disorder, unchecked, could get worse without the accommodation. A few hours later, after working uneventfully at his station, Barker was told that he was suspended

for 5 days. He hired an attorney, Mr. Johnson, who wrote to Mancor on May 12, 1999, notifying Mancor of Barker's complaints of disability harassment and retaliation. (App. A) Mancor HR manager, Ms. Smith, then called Mr. Barker, letting him know that she had received the letter fro Barker's attorney, and that he was being terminated. Mancor also sent a return letter, by "cc:" to the attorney, notifying him that Barker had been terminated upon receipt of the notice of representation. (App. B)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. An employer may not successfully employ a "direct threat" defense to an ADA claim without any objective evidence and an individualized assessment of the individual's present ability to safely perform the essential functions of the job.

Mancor claims that Barker was threatening (as opposed to having actually threatened anyone directly) and terminated him, ostensibly, for this reason. The only basis for this assertion given are the log sheets through which Barker is clearly engaging in protected acts, complaining of continuing harassment from co-workers. His written notes intimated

that he would spray a coworker's cigarette with water if the co-worker continued to expose Mr. Barker to what Mr. Barker, at the time, saw as a deadly toxin and weapon being used against him. His reference to "war" in the log sheet refers to taking this measure (spraying the cigarette, not the man with water) if management did not intervene.

Mancor's only defense to the retaliation claim is the "direct threat" affirmative defense. The District Court and the Appellate Court found that, even when reading the facts in a light most favorable to Barker (this case was dismissed on Summary Judgment), the Defendant had so overwhelmingly established the required elements to succeed with the direct threat defense, as set forth under the Code of Federal Regulations, that no reasonable juror could have found otherwise. However, the recent U.S. Supreme Court Opinion in Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002), sets a high burden for a Defendant using this affirmative defense.

The direct threat defense must be "based on a reasonable and/or the best available objective evidence," and upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended. Id., citing 29 C.F.R. 1630.2(r) The "direct threat"

defense is an affirmative defense, which means that Mancor had the burden of proof. Mancor failed to produce any evidence of a substantiated and specific threat that Barker did, could, or would have caused to anyone. In fact, no management member could identify any specific threat that Mr. Barker posed:

CURTIS BLOCK

Q. Did Mr. Williams or Cassidy ever complain that Mr. Barker had threatened them?

A. Not to me.

Q. Did they complain to anybody that you known of or that you've heard of?

A. Not to me and not anything written down to the team leader.

DILIP TEPPARRA

Q. Did you have any complaints from other employees about Mr. Barker harassing them?

A. I can't recall.

CHIP ESTES

Q. it's a very specific question whether somebody came to you and said that Fred had threatened them and because of that they were in fear that he would do something to them?

A. No. I don't think that he actually threatened that he was going to hurt anyone.

Teparra, the Plant Manager, who made the final termination decision, testified that the

perceived threat was based on his uneasiness with Mr. Barker's emotional disorders, and that he had heard of other workers in other places bringing guns to work. In the Chevron U.S.A., Inc. v. Echazabal decision, the Supreme Court clearly addresses the level of specificity needed to support the affirmative defense of "direct threat." Mancor's testimony falls short, in every respect, of those requirements. The petitioner respectfully requests that the Court grant certiorari on this case to address the standard, at the Summary Judgment stage, for a determination on the issue of the "direct threat" defense.

The ADA also defines a direct threat as "A significant risk to the health and safety of others, that cannot be eliminated by reasonable accommodation." 42 U.S.C. 12111(3); see also 29 C.F.R.1630.2 (r). The record clearly shows that the behavior upon which Mancor based its subjective and vague feelings of unease about Mr. Barker (the only evidence of a direct threat that was offered) arose solely from his reporting the harassment from co-workers based on his disabilities. It is clear from the record that Barker would not have begun to write his complaints on his log sheets had he been allowed to continue to use the reasonable accommodations afforded him earlier (ability to withdraw from confrontational situations) and had Mancor actually made a sincere attempt to enforce the no smoking accommodation that

Barker had requested. Clearly, even if Barker's complaints of harassment could be considered objective evidence of a direct threat to others, the behavior came about only because of the denial of Barker's requests for reasonable accommodations. As the behavior never manifested while the reasonable accommodations were in effect, it is reasonable to conclude that, even if Barker's alleged threatening behavior was viable evidence of a direct threat, it would not satisfy the statutory definition of direct threat under 42 U.S.C. 12111(3).

II. Bi-Polar Disorder and anxiety disorder should be considered a mentally disabling conditions covered under the ADA.

Among other disorders, the record shows that Mr. Barker suffers from a Bipolar Disorder and anxiety disorder. Bipolar Disorder and Anxiety Disorder are very similar in symptomology, and are often mistaken for each other during diagnoses. Bipolar disorder is a psychosis involving a mood disorder characterized by mood swings from mania (elevated mood and associated behavioral responses like hyperactivity, loud or pressured speech, distractibility, and disorganized behavior patterns) to depression (sadness, hopelessness, and social withdrawal) While Mr.

Barker was not diagnosed with Bipolar disorder until five weeks after his termination, he certainly exhibited the relevant characteristics while employed with Mancor. The U.S. Social Security Administration, in its determination of November of 1999, found Mr. Barker disabled by the Bipolar disorder as of the date of his termination from Mancor. In fact, the same characteristics which define his emotional disorders are the ones upon which Mancor management based its vague and unspecified fear of Mr. Barker.

Barker's constant physical activity (stretching and exercising at his work station) that Curt Block (Barker's supervisor) noted was a stage of hyperactivity, a symptom of the manic part of the disorder. The loud speech while talking to management at the last meeting prior to his suspension was both characteristic of the manic stage of Bipolar disorder, and consistent with the earlier diagnosis of Mr. Barker's anxiety disorder. Mr. Barker's intense negative emotional reaction to Ms. Smith's (the female HR director) comment to the effect that she would not date a short man is consistent with the depressive side of the disorder. It is very clear in the record that Mancor management, who were not able to identify even one instance of a direct threat to anyone, simply believed that because Mr. Barker was known to have theses disorders and had

exhibited behaviors consistent with them, he was, in some nebulous and unfounded sense, dangerous, and unfit for duty, or unable to perform the essential functions of his job.

A review of the published Fourth Circuit Opinions currently available show none which relate specifically to the Bipolar disorder and manifestations thereof as a disability under the ADA. However, the Tenth Circuit has dealt with such a case, and the EEOC has directly addressed the issue in its Enforcement Guidance. In Den Hartog v. Wasatch Academy, 129 F.3d 1076 (10th Cir.), the Court determined that Bipolar disorder of sufficient severity is a disability under the ADA. It qualifies as a mental disorder under the EEOC's refined definition of "disability" as "any mental or psychological disorder, such as ... emotional or mental illness." 29 C.F.R. 1630.2(h)(2) (1996). The EEOC, in one of its compliance manuals in 1996, specifically notes that Bipolar Disorder is a disability under the ADA. EEOC Enforcement Guidance: Psychiatric Disabilities and the ADA, 2 EEOC Compl. Man. (BNA), filed after section 902, at 15 Para(s) 1 (Mar. 25, 1997).

The Tenth Circuit, in Den Hartog, notes that its decision, determining that Bipolar disorder is a disability, that all other circuits which had considered the issue (including the Fourth Circuit) had found that Bipolar Disorder is a disability. "Applying the statutory

definition and the EEOC's guidance, every appellate court which has considered the question has held or assumed that 'bipolar disorder' is a mental disability covered under the ADA..." Den Hartog v. Wasatch Academy, 129 F.3d 1076 (10th Cir.) Footnote three to the opinion lists, as one of the decisions in which the Bipolar disorder was found to be a disability under the ADA, an unpublished opinion from the Fourth Circuit, Carrozza v. Howard County, Md., No. 94-1593, 1995 WL 8033, 45 F.3d 425 (4th Cir. Jan. 10, 1995).

In Garvey v. Jefferson Smurfit Corp., E.D. Pa, 8 *ADD* 8-123; 1308.22, the Court ruled that the Plaintiff's severe hypertension caused him to be disabled under the ADA. Similar to Barker's situation, Garvey's hypertension cause him to be substantially limited in his ability to engage in social interaction, as anytime he became involved in a confrontational social situation, his blood pressure would rise to dangerous levels. Barker's case is comparable and even compares favorably in that he is psychologically harmed and generally incapable of carrying on in a heated or confrontational situation.

The Petitioner respectfully requests that the Court accept Certiorari on this case to determine whether Bi-Polar disorder and anxiety disorder should be considered mentally disabling conditions covered under the ADA.

III. Where adverse employment action is motivated by behavior which is symptomatic of a disability, the Employer's action should be considered to have been taken "because of" the employee's disability.

Behavior that is a result of or a part of a disability can not form a legitimate reason for adverse employment action. For example, a hearing-impaired employee's raised voice, raised as a result of his hearing loss, can not be given as a reason for adverse employment action to avoid liability for disability discrimination. Though Mancor could not provide any specific examples of behavior for which it terminated Mr. Barker, citing only vague feelings of unease and feeling "threatened," it is clear that his actions which set him apart or caused their unease were symptoms of his disorders.

Some of the symptoms associated specifically with Barker's Bipolar disorder, and anxiety based disorders include manic mood swings, loud speech, distraction, bad judgment, and garrulousness. The physiological factors involved in the anxiety based disorders stem around the arousal of the autonomic nervous system in the manner of a "fight or flight" response to fearful inner impulses and emotions. The stress response results in the

characteristic body sensations often seen in a person experiencing a panic attack. Though the facts do not support its claim, Mancor has argued that Barker's loud and angry tone, and his agitated physical movements in the May 10th meeting made them feel threatened. Mancor's management clearly did not intend to terminate Mr. Barker before the meeting, or immediately after the meeting. If the decision to terminate was based on Mr. Barker's loud speech, agitated movements, or high anxiety exhibited during the meeting, in a confrontational situation which would foreeseeably produce the observed results (as Mr. Barker had repeatedly explained to Mancor management) then the termination decision is not legitimate, and should be considered a violation of the ADA. At the Summary Judgment juncture of a case, the Court is required to consider the case in a light most favorable to the non-moving party (in this case, Barker). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Evidence, at the summary Judgment stage, indicating that the employer's decision to take adverse employment action against an employee was based on consideration of foreseeable behavioral symptoms of that employee's known mental disabilities, should be considered as evidence of discriminatory motive, and preclusive of Summary Judgment against the employee.

IV. Short stature (height) in males should be considered as a physical disability based on social difficulties inherent in being in a class of males of short-stature.

Mr. Barker does suffer from several emotional disorders. His anxiety disorders and social phobias are affected by, and the effects worsened by his short stature. The Court should recognize that stature in males, in and of itself, should be considered a disability, as the female preference for tall men as mates limits their ability to socialize and eventually form intimate relationships with females, thereby ultimately limiting them in the major life activity of social interaction and reproduction.

The Court may take judicial notice that height (especially in men) is a physical characteristic that is given inordinate weight in our society's view of what is and what is not attractive. In his book, entitled "The Truth About Your Height," the author, Thomas T. Samaras explores many aspects of size and height relative to societal responses. The book explores the economic efficiency inherent in a society of shorter persons rather than larger ones. The record refers to a comment made by Mancor's HR director, Ms. Smith, indicating that she would never be interested in a relationship with a short man. This is at least some evidence that Mancor also recognized the

general tendency of females to shun intimacy with short men, and that Ms. Smith regarded Barker as a disabled person because of his short stature.

Barker views his short stature as an insurmountable obstacle to his ability to form intimate associations, or romantic relationships with women. From his viewpoint, therefore, he is denied the ability to have a family, or to engage in the contractual bonds of matrimony. In general, he argues that governmental programs requiring short statured men, who are socially incapable of forming a family due to the female aversion to short men, to support, through taxation, the education and healthcare of other couples' children are discriminatory, and actually put the short male in America in a position of involuntary servitude, in violation of the Thirteenth Amendment to the United States Constitution which includes the well established ban on involuntary servitude in this country.

Mr. Barker's Height is five feet three and ¾ inches. This is well below an average of 5 feet nine inches, and below the average height of women, at five feet four inches. Both Mr. Samaras (cited above) and the investigative report done by the news program 20/20, generally agree upon these figures. Dr. Les Martel, a Psychologist who spoke on 20/20, confirmed that men are judged based upon height, size, and physical presence. (20/20

program, Summer 1998.) Please note that Counsel for the Petitioner is in possession of the program, which focus on discrimination against short males, and can produce it should this Court decide that viewing it would be advisable). This has severely affected Mr. Barker's ability to engage in social relationships with women. Barker considers it common knowledge that women prefer the "tall dark and handsome" male to others, and that most females end up with males who are taller than they are. He notes that prostitution, rape, and sexual harassment are all considered unlawful across the country. Barker sees these laws as protecting females from their own discriminatory choice to associate with men who are capable, through brute force, as a result of their size, of inflicting this type of harm. Some simple social experiments done by the 20/20 staff in 1998 prove the point that short stature in males is devastating to women's perception of their attractiveness. In the tests, the female subjects simply refused to consider male participants who were under five foot six. (see note above, a copy of the relevant program is available through Petitioner's attorney.) A scientific research paper in the journal, Nature, dated January 13, 2000 generally confirmed the results of the 20/20 program experiment. The researcher apparently began his study based on the fact that men below five foot three inches (where an average male height was five foot

six) would not advertise height in personal ads. Barker is in possession of the article, and will produce it to the Court if requested. In Bragdan V. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998), the Court opined that a person who was HIV positive (but did not suffer from AIDS) was substantially limited in the major life activity of engaging in social relationships because of the fear of passing the HIV virus on to a mate. The HIV positive person was substantially limited in the major life activity of reproduction. Mr. Barker's disability of being short in stature, especially combined with his social phobias, anxiety disorder, and Bipolar disorder, make it near impossible for him to initiate social relationships with women, and are close to prohibitive when it comes to intimacy with the opposite sex. In his situation, his disabilities are much more severe than in Bragdan v. Abbott though they have the same result. Whereas a person who is HIV positive would be restricted from sexual intercourse, and reproduction for fear of infecting a loved one or mate, Mr. Barker's restrictions arise not from a choice to avoid danger to another, but an actual inability to initiate and carry out the relationship.

V. Barker's argument concerning short stature in males and Involuntary servitude

Black's Law Dictionary defines "involuntary servitude" as the condition of one who is compelled by force, coercion, or imprisonment, and against his will to labor for another, whether he is paid or not. Barker, whose emotional disorders (discussed above) are complicated by his short stature, sees his predicament as a man of short stature as subjecting him to a form of involuntary servitude. As he sees it, domestic violence laws protect women who continually flaunt the inherent risk in establishing a relationship with a man who, by virtue his size can over power them. He feels that this detracts from the attractiveness of being with a smaller man, who could not harm them. Barker sees this protection, while necessary to some extent, as adversely affecting a short man's (his) chances of finding a mate.

While he agrees that females have a constitutional right to exercise their preference in mates by excluding males because of short stature, Barker reads the thirteenth amendment to require that women who choose to exclude from intimate relationships, short statured males because of their short stature alone, should not benefit from government programs funded by taxes collected from the excluded males. Barker insists that this is a form of involuntary servitude, in that he is forced by law (he argues that he could be imprisoned for

failure to pay taxes) to pay to raise and educate children when he is excluded from having any himself. Barker argues that the short statured male is the only one of the sexes affected by this form of involuntary servitude, as a female who finds herself unable to find a mate, can still produce a child through artificial insemination, and have the benefits of a family.

VI. Barker's claims should fall outside of South Carolina's Worker's Compensation choice of remedies exclusions.

South Carolina law makes an exception to the Workers Compensation exclusive remedies provision where the offending employee (the one who caused the injury forming the basis of the complaint) was an alter ego of the employer. Boulware v. Mills, 294 S.C. 24, 362 S.E.2d 184 (Ct. App. 1987). It was the upper level management, including the Plant Manager Dilip Teppara, who allowed the harassment by Mr. Barker's Co-workers to continue, even after Barker's complaints. Teparra, received authority from the actual owners of Mancor, and eventually became the Vice president of the Mancor division where Barker worked. This conferring of ultimate authority made Tepparra an alter ego of the company, as they were allowed to make decisions binding on the company in the owner'

absence. As alter-egos of Mancor, their actions should bind Mancor beyond the reach of the Worker's compensation exemptions.

South Carolina law also defines an "accident" as an event which is not expected, not within foresight of the person who suffered the injury. "Accidents" are events which are the result of mishaps due to non-willful causes, like miscalculation, negligence, or carelessness. Lanford v. Clinton Cotton Mills, 204 S.C. 423, 428-29, 30 S.E.2d at 39. From the fact in this case, as presented to the Court at the Summary Judgment stage, it is clear that Mancor and Barker were fully aware that Mr. Barker was suffering deliberate harassment from his co-workers. Barker's statements, describing the "fight or flight" impulses he was feeling, and his rising anxiety (that he could blow up like an atomic bomb) put Mancor on notice that Barker needed to be free from the harassment in order to function. This, in fact, is what is required of Barker under the ADA, that he actually explains to the employer how his disabilities affect him. Barker's knowledge of his own prior termination from another job under similar circumstances put him on notice of the effects of such harassment on his psyche and resulting behavior.

Mancor's knowing refusal to take any serious action to stop the harassment was willful. It simply does not fit the applicable definition of "accident." The Court should find

that where a business knowingly allows reported harassment to continue, a South Carolina common law claim based on the theory of negligent supervision should not be precluded by the Worker's Compensation exclusive remedies provisions of the South Carolina statutory law.

VII. Ineffective accommodations to a disabled person should be considered a denial of reasonable accommodations.

The record in this case shows that Barker did make multiple and clear requests for reasonable accommodations from Mancor. He requested, for example, a separate gauge table at which to work, a no smoking zone, enforced at his work station only (the rest of the plant was not smoke free), help on "hot jobs," which were, by their nature, high pressure situations, and, of course the ability to withdraw when faced with severe anxiety levels during confrontational situations.

Mancor did not agree to the separate gauge table. Supervisors did ask other workers not to smoke near Barker's work area, but did not use mandatory language, or take more than soft suggestion and polite requests to enforce the accommodation. Mancor certainly never leveled any discipline against any worker who openly violated these requests. Though the "withdrawal" accommodation was granted for a

time, resulting in Barker's ability to perform his job at or above an acceptable level, Mancor clearly withdrew this accommodation. Had Mancor actually made an honest and effective attempt to enforce the "no smoking" accommodation, Barker's anxiety problems would not have driven him to the behavior which Mancor eventually cited as its reason for terminating him. By only half heartedly (at best), and ineffectively accommodating Mr. Barker's disabilities, Mancor actually, de facto, denied him the reasonable accommodations that he had requested. The Court should find that evidence that the employer had disingenuously or ineffectively implemented reasonable accommodations should be considered evidence of a denial of reasonable accommodations. Such evidence should preclude summary judgment on this issue.

VIII. The Court should consider close proximity in time between a protected act and adverse employment action, where there is no intervening cause for the adverse employment action other than the protected act, as evidence of pretext, and support for a prima facie case of retaliation.

On May 10, 1999, Mancor had decided to deliver to Barker a letter, telling him to stop complaining of harassment by writing the

complaints on his log sheets. Both his supervisor, and the HR manager, Ms. Smith believed, at least prior to the meeting where the letter was presented, that Barker had done nothing warranting discipline. At the meeting, Barker engaged in a protected act by arguing that the writing was a complaint of disability harassment, and that Mancor should not be able to punish him for reacting to the harassment when it had recently withdrawn his right to withdraw from the same confrontational situations. After the meeting, Barker returned to work. Hours later, Mancor suspended him and sent him home. Barker did nothing but work in the meantime. Barer immediately sought out an attorney, who wrote a letter (App. A) notifying Mancor that Barker was represented and explaining his claims of discrimination. Upon receipt of the letter, Mancor called Barker at home and terminated him. Mancor also sent a copy of the notice of termination, by "cc:" to the attorney, in response to his letter. (App. B)

Mancor claims that it put Barker on suspension due to his raised voice, agitated behavior, and statement "y'all ain't seen nothing yet," uttered as he left the meeting. As argued above, this should be considered discriminatory action based on consideration of Barker's disability. The termination occurred while Barker was on suspension. Thus there was no opportunity for Barker to have done anything to

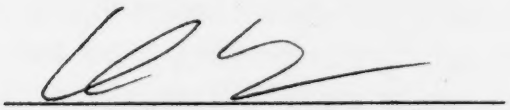
cause his termination, other than have his attorney sent the letter of May 9, 1999. Where, between continuing employment and termination, there is no intervening contact between an employer and employee other than the protected act itself, the Court should accept this as evidence of pretext, and as support for a prima facie case of retaliation, under a Title VII analysis at the summary judgment stage. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). Certainly, given such a scenario, a reasonable juror could find that the employer's choice to terminate was linked, causally, to the employee's having engaged in a protected act.

CONCLUSION

The trial court dismissed this case by granting the Defendant's Motion for Summary Judgment. The Summary Judgment hurdle for the Plaintiff is supposed to be a relatively low one. The Court is charged with determining, after reading the facts in a light most favorable to the Plaintiff, and resolving every disputed factual inference in his favor, whether there are any genuine issues of material fact. This is a case which clearly should have survived Summary Judgment in the District Court, and should have been reversed and remanded by the Fourth Circuit Court of Appeals. The Plaintiff respectfully requests that the Court grant his

petition, and grant a certiorari review of this case.

Respectfully Submitted,



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Counsel of Record for Fred Barker

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2363

FRED BARKER, JR.,

Plaintiff - Appellant,

versus

MANCOR CAROLINA, INCORPORATED,

Defendant - Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Matthew J. Perry, Jr., Senior District Judge.
(CA-00-1427)

Submitted: November 19, 2002
Decided: December 13, 2002

Before MICHAEL, Circuit Judge, HAMILTON, Senior Circuit Judge, and Claude M. HILTON, Chief United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

Chalmers C. Johnson, CHALMERS JOHNSON LAW FIRM, Charleston, South Carolina, for Appellant. Vincent A. Sheheen, SAVAGE, ROYALL & SHEHEEN, L.L.P., Camden, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Fred Barker, Jr., appeals the district court's order accepting the recommendation of the magistrate judge to grant Mancor Carolina, Inc.'s motion for summary judgment in Barker's action alleging employment discrimination. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Barker v. Mancor Carolina, Inc., No. CA-00-1427 (D.S.C. filed Oct. 12, 2001 & entered Oct. 15, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented

in the materials before the court and argument would not aid the decisional process.

AFFIRMED

JUDGMENT
FILED: December 13, 2002

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

NO. 01-2363
CA-00-1427

FRED BARKER, JR.

Plaintiff – Appellant

v.

MANCOR CAROLINA, INCORPORATED

Defendant – Appellee

Appeal from the United States District Court
for the District of South Carolina at Columbia

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor

CLERK

BEST AVAILABLE COPY

APPENDIX B

ENTERED
OCT 15 2001

FILED
OCT 12 2001
LARRY W. PROPES, CLERK
COLUMBIA, SC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FRED BARKER, JR.,]	CIVIL ACTION NO. 3:00-1427-IOBC
Plaintiff,]	
vs.]	**ORDER**
MANCOR CAROLINA, INC.,]	
Defendant.]	
]	

This case is before the Court pursuant to a report and recommendation submitted by United States Magistrate Judge Joseph R. McCrorey, to whom it was referred for review under 28 U.S.C. § 636 and this

Court's local rules. The action was commenced by the plaintiff, Fred Barker, Jr., against his former employer, defendant Mancor Carolina, Inc. In the Court of Common Pleas for Richland County, South Carolina and was thereafter removed to this Court by the defendant. In his complaint, plaintiff alleges that the defendant violated his rights under the Americans with Disabilities Act 42 U.S.C. § 12101, *et seq* (ADA) when it terminated his employment on May 14, 1999. Additionally, plaintiff asserts claims of negligence and reckless supervision and retention of employees. The defendant denies that it has acted in violation of any of the claims upon which the plaintiff seeks relief. Additionally, the defendant moves for summary judgment.

Upon his exhaustive review, based upon the record, the Magistrate Judge states, as follows, the relevant background of this controversy.

1. Barker alleges he suffers from the disabilities of asthma and anxiety. He began working for Mancor as a press brake operator in Mancor's Lugoff, South Carolina plant in November of 1995. Barker Dep. 7-8.

2. Mancor is a precision manufacturer of metal components and sub-assemblies for trucking and related industries. Its manufacturing process consists of cutting, burning, and grinding metal to form parts.

3. At the time of the alleged incidents, Dilip Teppara ("Teppara") was General Manager; Robert A. Estes, Jr. ("Estes")

was Production Manager; Curtis Block ("Block") was team leader for Barker's Area (*See* Estes dep. 17); and Mary Ann Cate Smith ("Smith") was Human Resources Director for Mancor.

4. Within two years of beginning employment at Mancor, Barker, who suffers from allergies from dust and alleges he has asthma, complained that the dust and general air quality in the plant were causing him trouble. Barker Dep. 9. On February 29, 1996, Barker's physician wrote that Barker "has allergies to dust and should minimize his exposure to dust in the workplace." Defendant's Motion for Summary Judgment, Ex. 3.

5. Mancor's facility consists of one large work floor where many employees work at different tasks. Significant numbers of employees are involved in welding, cutting, and grinding metal parts. These activities produce smoke and dust. In addition, the facility allows employees to smoke tobacco products. Defendant*s Motion for Summary Judgment, at 3. Estes Dep. 15.

6. Mancor performed inspections, added features to the plant to help to control the amount of debris in the air, provided Barker with a dust mask which he could wear as needed, placed a curtain around his workstation, and instructed other employees not to smoke his work area. *See* Estes Dep. 14-15; Barker Dep. 13.

7. On September 8,1997,

Barker requested accommodations including: (1) a 40-hour work week, with possibly half day of work on Saturday and Sunday if requested; (2) minimization of movement from one brake press to another within cell; (3) larger lot sizes for certain part numbers; (4) help from others at times when set ups were needed for "hot'9 jobs; (5) a pin fixture for the Accupress machine; (6) one backgage for each brake press in cell; (7) maternity benefits for mother of child, regardless of marital status; and (8) insurance coverage for sexual dysfunction. In response, Smith wrote a letter stating that: (1) Barker's hour limitations would be accommodated; (2) Barker had agreed in a meeting that he would be willing to move with possible further discussion needed to clarify exactly what he was requesting; (3) larger lot sizes would be addressed an a case-by-case basis; (4) Barker had received help from other employees in the past and would continue to receive it as needed from a coordinator or coworker; (5) the pin fixture and backgages had been ordered and would benefit all brake press operators in cell; and (6) Mancor could not accommodate the health insurance change requests. Plaintiff's Memorandum, Ex. 7, Attachment E-7.

8. Barker's psychiatrist, Dr. Philip G. Steude ("Dr. Steude"), wrote a letter to Mancor on September 22, 1997. Dr. Steude explained that Barker was under treatment with Paxil for Panic Disorder with social phobias and stated [f]or reasonable accommodation of his illness, it is important that Mr. Barker first of all work

reasonably normally and a minimum most week of 40 weeks ... Excessively long days, i.e. 10 hours or more, and excessively long weeks, i.e. 48 hours or more per week should be avoided." Defendant's Motion for Summary Judgment, Ex. 8.

9 Barker alleges that coworkers harassed him by continuing to smoke in his work area. He claims that the two most aggressive harassers were Jackie Williams and Wayne Frye, who continually disobeyed Block*s order to not smoke in Barker's work area. Plaintiff*s Opp. Memorandum, at 6.

10. On one occasion, one of Barker's coworkers wrote on a chalk board: Someone please carry Fred to Bull St. They have a special going on [sic] $35.00 a head.' Barker Dep. 23. The message remained on the board for approximately one day. Barker testified that his coworkers took the message down when they realized how mad he was about the incident. Barker Dep. 23-26.

11. On another occasion, a coworker placed a photograph on a bulletin board. The photograph showed two wrestlers (one much larger than the other), with a caption reading: "Feel My Rage! Fred Downs Andre Boone for smoking near him." Block Dep., Ex. 1.

'The parties have not provided the date this incident occurred.

12. Barker alleges that on other occasions employees made statements that he was crazy.

13. In December of 1998, Barker filed a Charge of Discrimination with the South Carolina Human Affairs Commission ("SCHACII), alleging sex discrimination based on Mancor's denial of Barker's request for insurance to cover treatment for sexual dysfunction and for maternity and health insurance to be extended to non-married sexual partners of Mancor's employees, so that if a male employee had a child out of wedlock, the mother and child would be entitled to coverage. He wrote that his disabilities were allergies, asthma, anxiety disorder NOS, short stature (substantially limiting reproduction due to attitudes of others toward his height), and short stature in combination with anxiety disorder. The charge was dismissed at the time it was presented. Plaintiffs Memorandum in Opposition to Summary Judgment, at 3; Barker Dep. 17,20; Defendant's Motion for Summary Judgment, Ex. 4.

14. On April 9, 1999, Barker received a verbal warning for leaving work on more than one occasion. He was informed that the next such occurrence would result in a three-day suspension. Defendant's Motion for Summary Judgment, Ex. 5.

---

2. Barker has provided little detail as to

these alleged incidents and has not provided the dates on which they allegedly occurred.

15. Around the early part of 1999, Barker began writing his complaints down on a work sampling form. This form was meant for workers to write down the reasons for work delays. *See* Plaintiff's Ex. 7.

16. Barker received an increase in pay for $11.25 to $11.75 per hour on April 12, 1999. Defendant's Motion for Summary Judgment, Ex. 10.

17. On a Mancor work sampling form dated May 4, 1999, Barker placed the comment "Anxiety ran very high due to smoking in area. I sprayed painted [sic] curtain to read "Please No Smoking.' If I have to fight to protect my health then so be it. I have explained] that the anxiety acts as a defense mechanism. If I am provoke[d] that [sic] I may fight or run .... 11 Defendant's Motion for Summary Judgment, Ex. 6.

18. On a work sampling form dated May 7,1999, Barker wrote "Jackie continues to. smoke at gage table. If he continues I will spray his cig with water to douse it out. For I no longer give a damn! If War he wants [sic] War he will get." Defendant's Motion for Summary Judgment, Ex. 6 (emphasis in original).

19. On May 10,1999, Smith, Block, and Estes met with Barker, and Block presented Barker with a note instructing Barker that the work sampling forms were not to be used for collection of personal

information, instructed him that personal problems should be taken up with the team coordinator or human resources, informed him that there was concern from team members who felt threatened, and warned him that further threats would result in disciplinary action up to and including termination. Block Dep., Ex. Barker signed the form and then stated "Ya'll ain't seen nothing yet." Defendant's Motion for Summary Judgment, Ex. 1, page 11.

20. After the meeting, Barker was suspended for five days with pay based on Mancor's perception of the comments on the sampling sheets and the May 10 meeting as threatening. Defendant's Motion for Summary Judgment, Ex. 7.

21. Smith called Barker at home on May l4,1999,and notified him that Mancor had terminated him. Barker Dep. 23. Also on that date, Mancor sent a letter to Barker with a copy to his attorney, signed by Block, Estes, and Teppara, notifying Barker of his termination. Estes Dep.,Ex. 1.

22. Barker subsequently filed a complaint with the EEOC and SCHAC alleging discrimination based on disability and retaliation. He received a right-to-sue notice from the EEOC on March 179 2000. Complaint, at 1.

Plaintiff contends that the defendant discriminated against him in violation of the ADA because (1) he was subjected to a hostile working environment; (2) defendant failed to reasonably accommodate his disability; (3)

defendant terminated him because of his disabilities; and (4) defendant retaliated against him because he engaged in a protected activity. Plaintiff also contends that the defendant negligently supervised and retained certain employees, resulting in injury to the plaintiff. The defendant contends it is entitled to summary judgment because (1) plaintiff not shown that he is "disabled" as defined under the ADA; (2) plaintiff's evidence does not establish a *,prima facie* case of harassment; (3) even if he is disabled, defendant has accommodated plaintiff's reasonable requests; (4) plaintiff was terminated because of his threatening comments and not because of any disability; (5) plaintiff's evidence falls to establish a *prima facie* case of retaliation and fails to demonstrate that the defendant's legitimate, non-discriminatory reasons for terminating him are pretextual; and (6) that the plaintiff's negligent retention claim is barred by the South Carolina Workers' Compensation Act.

The Magistrate Judge has conducted a thorough review of the plaintiff's contentions and the applicable law and, upon review, he observes that the plaintiff's evidence falls to establish that he is entitled to relief upon any of the claims stated in the complaint. And, as to the plaintiff's contention that the defendant negligently supervised and retained certain of its employees resulting in injury to the plaintiff, the Magistrate Judge observes that this claim is preempted under the South Carolina Workers' Compensation Act. *Loges v. Mack Trucks, Inc.,*

417 S.E. 2d 538 (SC 1992). Based upon these observations the Magistrate Judge recommends that the defendant's motion for summary judgment be granted.

The plaintiff objects to the recommendation. Specifically, plaintiff objects to the Magistrate Judge's conclusion that there is no genuine issue material fact concerning whether the plaintiff is a qualified individual with a disability and he argues that the record supports his contention that he suffers from "severe anxiety disorders and social Phobias." He argues that he is "severely limited in his ability to cope with social situations" and that he is "substantially limited in the major life activity of reproduction ..." He objects to the Magistrate Judge's finding that, on the evidence of record, the plaintiff does not suffer from asthma. He points to his deposition testimony as constituting evidence of fact on that issue. He also points to the testimony of the defendant's human resources officer who, he states, admitted that she had received a note from plaintiff's physician, confirming his asthmatic condition; and he urges that, considering the record in the light most favorable to the plaintiff, the Court should find that there is a genuine issue of material fact as to whether he suffers from asthma. He objects to the Magistrate Judge's conclusion that the evidence does not establish that plaintiff was subjected to a hostile work environment. He argues that the evidence supports his contention that his fellow employees smoking near him

was part of the harassment. Then he complains about the Magistrate Judge's finding that "the wrestling poster, the Bull Street message and comments referring to the plaintiff as crazy were sporadic and so few in nature as to fall short of the mark for hostile work environment." He objects to the Magistrate Judge's finding that the record of evidence fails to establish that the plaintiff was terminated because of a "disability" and he argues that the record of evidence supports his contention and that it creates a genuine issue of fact which should preclude the entry of summary judgment.

This Court has carefully considered all of the objections and the arguments thereon and has reviewed the record of evidence *de ,novo,* together with the report and recommendation and has concluded that the plaintiff's objections are without merit. The Magistrate Judge has carefully reviewed the arguments and has correctly stated the applicable legal principles. Therefore, the Court has concluded that the recommendation must be and is hereby approved. Accordingly, the defendant's motion for summary judgment is hereby ***GRANTED***.

IT IS SO ORDERED.

s/ _____
MATTHEW J. PERRY, JR.
SENIOR UNITED STATES
DISTRICT JUDGE

Columbia, South Carolina,
October 11, 2001.

APPENDIX C

FILED
AUG 07 2001
LARRY W. PROPES, CLERK
COLUMBIA, SC

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FRED BARKER, JR.,	)	Civil Action No.
	)	3:00-1427-1OBC
Plaintiff,	)	
	)	
vs.	)	
	)	
MANCOR	)	
CAROLINA, INC.,	)	
	)	**MAGISTRATE**
Defendant.	)	**JUDGE'S**
	)	**REPORT AND**
	)	**RECOMMENDATION**

Plaintiff, Fred Barker, Jr. ("Barker") filed this action in the Court of Common Pleas for Richland County on April 24, 2000. On May 10, 2000, Defendant, Mancor Carolina, Inc. ("Mancor') removed this action to this court. Barker alleges that Mancor violated his rights under the Americans with Disabilities

Act, 42 U.S.C. § 12101, et seq. ("ADA").1 Additionally, Barker alleges a claim for negligence, gross negligence, and reckless supervision and retention of employees. On February 8, 2001, Mancor filed a motion for summary judgment. Barker filed a memorandum in opposition to summary judgment on February 23, 2001.2 Mancor filed a reply on March 7, 2001.

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1 Pretrial matters in this case were referred to the undersigned pursuant to Rule 73.02(B)(2)(g), DSC. Because this is a dispositive motion, this report and recommendation is entered for review by the court.

2 This document is fifty-nine pages long. The Local Rules provide that "Unless an exception is granted by the Court, no memorandum shall exceed: (1) 35 double-spaced pages, in the case of an initial brief of any party (Local Civil Rule 7.04)." Local Civil Rule 7.05, D.S.C. Barker did not file a motion for such an exception.

SUMMARY JUDGMENT STANDARD

When no genuine issue of any material fact exists, summary judgment is appropriate. Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir. 1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. id. Courts take special care when considering summary judgment in employment discrimination cases because states of mind and motives are often crucial issues. Ballinger v. North Carolina Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir.), cert. denied, 484 U.S. 897 (1987). This does not mean that summary judgment is never appropriate in these cases. To the contrary, "'the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.'" Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." Ross v. Communications Satellite CoM., 759 F.2d 355, 364 (4th Cir. 1985).

In this case, defendant "bears the initial burden of pointing to the absence of a genuine issue of material fact." Temkin v. Frederick County Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991), cert. denied, 502 U.S. 1095 (1992)

(citing Celotex CoEp. v. Catrett, 477 U.S. 317, 322 (1986). If defendant carries this burden, "the burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact." Id. at 718-19 (citing Anderson 488 U.S. at 248 -48).

Moreover, "once the moving party has met his burden, the nomnoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial," Baber v. Hosp. Corp. of Am., 977 F.2d 872,874-75 (4th Cir. I992). The non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. Id. and Doyle v. Sentry Inc., 877 F. Supp, 1002, 1005 (E.D. Va. 1995). Rather, the non-moving party is required to submit evidence of specific facts by way of affidavits, see Fed. R. Civ. P. 56(e), depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. Baber, citing Celotex Colp., supra. Moreover, the non-movant's proof must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corn., 12 F.3d 1310, 1316 (4th Cir. 1993) and DeLeon v. St. Joseph Hospital, Inc., 871 F.2d 1229,1233 (4th Cir. 1989), n.7, cert. denied, 493 U.S. 825 (1989). Unsupported hearsay evidence is insufficient to overcome a motion for summary judgment. Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547

(5th Cir. 1987) and Evans v. Technologies Applications & Services Co., 80 F.3d 954 (4th Cir. 1996).

FACTS

1. Barker alleges he suffers from the disabilities of asthma and anxiety. He began working for Mancor as a press brake operator in Mancor's Lugoff, South Carolina plant in November of 1995. Barker Dep. 7-8.
2. Mancor is a precision manufacturer of metal components and sub-assemblies for trucking and related industries. Its manufacturing process consists of cutting, burning, and grinding metal to form parts,
3. At the time of the alleged incidents, Dilip Teppara ("Teppara") was General Manager; Robert A. Estes, Jr. ("Estes") was Production Manager; Curtis Block ("Block") was team leader for Barker's Area (See Estes dep. 17); and Mary Ann Cate Smith ("Smith") was Human Resources Director for Mancor.
4. Within two years of beginning employment at Mancor, Barker, who suffers from allergies from dust and alleges he has asthma, complained that the dust and general air quality in the plant were causing him trouble. Barker Dep. 9. On February 29, 1996, Barker's physician wrote that Barker "has allergies to dust and should minimize his

exposure to dust in the workplace." Defendant's Motion for Summary Judgment, Ex. 3.

5. Mancor's facility consists of one large work floor where many employees work at different tasks. Significant numbers of employees are involved in welding, cutting, and grinding metal parts. These activities produce smoke and dust. In addition, the facility allows employees to smoke tobacco products. Defendant's Motion for Summary Judgment, at 3. Estes Dep. 15.

6. Mancor performed inspections, added features to the plant to help to control the amount of debris in the air, provided Barker with a dust mask which he could wear as needed, placed a curtain around his workstation, and instructed other employees not to smoke his work area. See Estes Dep. 14-15; Barker Dep. 13.

7. On September 8, 1997, Barker requested accommodations including: (1) a 40-hour work week, with possibly half day of work on Saturday and Sunday if requested; (2) minimization of movement from one brake press to another within cell; (3) larger lot sizes for certain part numbers; (4) help from others at times when set ups were needed for "hot" jobs; (5) a pin fixture for the Accupress machine; (6) one backgage for each brake press in cell; (7) maternity benefits for mother of child, regardless of marital

status; and (8) insurance coverage for sexual dysfunction. In response, Smith wrote a letter stating that: (1) Barker's hour limitations would be accommodated; (2) Barker had agreed in a meeting that he would be willing to move with possible further discussion needed to clarify exactly what he was requesting; (3) larger lot sizes would be addressed on a case-by-case basis; (4) Barker had received help from other employees in the past and would continue to receive it as needed from a coordinator or coworker; (5) the pin fixture and backgages had been ordered and would benefit all brake press operators in cell; and (6) Mancor could not accommodate the health insurance change requests. Plaintiff s Memorandum, Ex. 7, Attachment E-7.

8. Barker's psychiatrist, Dr. Philip G. Steude ("Dr. Steude"), wrote a letter to Mancor on September 22, 1997. Dr. Steude explained that Barker was under treatment with Paxil for Panic Disorder with social phobias and stated "[f]or reasonable accommodation of his illness, it is important that Mr. Barker first of all work reasonably normally and a minimum most week of 40 weeks ... Excessively long days, i.e. 1 0 hours or more, and excessively long weeks, i.e. 48 hours or more per week should be

avoided." Defendant's Motion for Summary Judgment, Ex. 8.

9. Barker alleges that coworkers harassed him by continuing to smoke in his work area. He claims that the two most aggressive harassers were Jackie Williams and Wayne Frye, who continually disobeyed Block's order to not smoke in Barker's work area. Plaintiff s Opp. Memorandum, at 6.

10. On one occasion, one of Barker's coworkers wrote on a chalk board: "Someone please carry Fred to Bull St. They have a special going on [sic] $35.00 a head."3 Barker Dep. 23. The message remained on the board for approximately one day. Barker testified that his coworkers took the message down when they realized how mad he was about the incident. Barker Dep. 23-26.

11. On another occasion, a coworker placed a photograph on a bulletin board. The photograph showed two wrestlers (one much larger than the other), with a caption reading: 'Feel My Rage! Fred Downs Andre Boone for smoking near him." Block Dep., Ex. 1.

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3 The parties have not provided the date this incident occurred.

12. Barker alleges that on other occasions employees made statements that he was crazy.4

13. In December of 1998, Barker filed a Charge of Discrimination with the South Carolina Human Affairs Commission C'SCHAC"), alleging sex discrimination based on Mancor's denial of Barker's request for insurance to cover treatment for sexual dysfunction and for maternity and health insurance to be extended to non-married sexual partners of Mancor's employees, so that if a male employee had a child out of wedlock, the mother and child would be entitled to coverage. He wrote that his disabilities were allergies, asthma, anxiety disorder NOS, short stature (substantially limiting reproduction due to attitudes of others toward his height), and short stature in combination with anxiety disorder. The charge was dismissed at the time it was presented. Plaintiffs Memorandum in Opposition to Summary Judgment, at 3; Barker Dep. 17, 20; Defendant's Motion for Summary Judgment, Ex. 4.

14. On April 9, 1999, Barker received a verbal warning for leaving work on more than one occasion. He was informed that the next such occurrence would result in a three-day suspension.

Defendant's Motion for Summary Judgment, Ex. 5.

15. Around the early part of 1999, Barker began writing his complaints down on a work sampling form. This form was meant for workers to write down the reasons for work delays. See Plaintiff's Ex. 7.

16. Barker received an increase in pay for $11.25 to $11.75 per hour on April 12, 1999. Defendant's Motion for Summary Judgment, Ex. IO.

17. On a Mancor work sampling form dated May 4, 1999, Barker placed the comment "Anxiety ran very high due to smoking in area. I sprayed painted [sic) curtain to read 'Please No Smoking.' If I have to fight to protect my health then so be it. I have explain[ed] that the anxiety acts as a defense mechanism. If I am provoke[d] that [sic] I may fight or run.....Defendant's Motion for Summary Judgment, Ex. 6.

18. On a work sampling form dated May 7, 1999, Barker wrote "Jackie continues to smoke at gage table. If he continues I will spray his cig with water to douse it out. For I no longer give a damn! If War he wants [sic] War he will get."

---

4 Barker has provided little detail as to these alleged incidents and has not provided the dates on which they allegedly occurred.

Defendants' Motion for Summary Judgment, Ex. 6 (emphasis in original).

19. On May 10, 1999, Smith, Block, and Estes met with Barker, and Block presented Barker with a note instructing Barker that the work sampling forms were not to be used for collection of personal information, instructed him that personal problems should be taken up with the team coordinator or human resources, informed him that there was concern from team members who felt threatened, and warned him that further threats would result in disciplinary action up to and including termination. Block Dep., Ex. Barker signed the form and then stated "Ya'll ain't seen nothing yet." Defendant's Motion for Summary Judgment, Ex. 1, page 11.

20. After the meeting, Barker was suspended for five days with pay based on Mancor's perception of the comments on the sampling sheets and the May 10 meeting as threatening. Defendants' Motion for Summary Judgement, Ex. 7.

21. Smith called Barker at home on May 14, 1999, and notified him that Mancor had terminated him. Barker Dep. 23. Also on that date, Mancor sent a letter to Barker with a copy to his attorney, signed by Block, Estes, and Teppara, notifying Barker of his termination. Estes Dep., Ex. 1.

22. Barker subsequently filed a complaint with the EEOC and SCHAC alleging discrimination based on disability and retaliation. He received a right-to-sue notice from the EEOC on March 17, 2000. Complaint, at 1.

DISCUSSION

Barker alleges that Mancor discriminated against him in violation of the ADA because: (1) he was subjected to a hostile working environment; (2) Mancor failed to reasonably accommodate his disability; (3) Mancor terminated him based on his disabilities; and (4) Mancor retaliated against him for engaging in a protected activity. He also alleges that Mancor negligently supervised and retained employees, resulting in injury to him. Mancor argues that it is entitled to summary judgment because: (1) Barker's ADA claims fail because he fails to show that he is "disabled" as defined under the ADA; (2) Barker fails to establish a prima facie case of harassment; (3) even if he is disabled, Mancor accommodated all of Barker's reasonable requests; (4) Barker was terminated because of his threatening comments and not based on any disability; (5) Barker fails to establish a prima facie case of retaliation and fails to show that Mancor's legitimate, nondiscriminatory reasons for its actions are pretextual; and (6) Barker's negligent retention claim is barred by the South Carolina Workers' Compensation Act.

I. ADA

Congress passed the ADA "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U. S.C. § 121 0 1 (b)(2). The Act became effective on July 26, 1992.

The Act [§ 12112(a)] provides in part:

> No covered entity5 shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). According to the Act the term "discriminate" includes:

> denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such

5 Mancor has not argued that it is not a covered entity.

> covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C. § 12112(b)(5)(B). The Act further defines "reasonable accommodation" to include:

> job restructuring, part-time or modified work schedules, reassignment to a vacant position. . . and similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9)(B).

A. Disability under the ADA

Barker's claims under the ADA for harassment, failure to accommodate, and termination all require that he establish that he has a disability under the ADA.[6] Mancor argues that Barker fails to show that he is disabled within the meaning of the ADA because he does not have a condition that substantially limits one or more major life activities. Barker argues that he is disabled within the meaning of

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6 Each of these causes of action are discussed further below.

the ADA because his impairments substantially limit one or more of his major life activities, he has a record of disability, and Mancor perceived him as disabled.

Under the ADA, disability is defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

1. Substantially Limits Major Life Activity

Baker alleges that his impairments substantially limit major life activities. Specifically, he alleges that he suffers from asthma which interferes with the major life activity of breathing. He also alleges that he suffers from an anxiety disorder which makes him unable to handle confrontational

situations, and that he suffers from an anxiety disorder concerning his height that causes him to have problems in confrontational situations, such that his mental problems substantially limit him in the major life activity of reproduction, since he is unable to engage in the social interaction necessary to find a mate.7

"A physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA. The statute requires an impairment that substantially limits one or more of the major life activities." Dutcher v. Inizalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995). "Major life activity" is defined as "functions such as caring for oneself performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). "Substantially limits" is defined as:

> (i) unable to perform a major life activity that the average person in the general population can perform, or

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7 Barker compares his case to that Bragdan v. Abott, 524 U.S. 624 (1998), in which the plaintiff was infected with the HIV virus. Barker's argument that he is limited in the major life activity of reproduction fails, because he fails to show that his mental illness is similar to the HIV virus in that it limits reproduction.

> (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2 0)(1). The ADA regulations specify three factors relevant in considering whether an impairment substantially limits a major life activity: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.26)(2); see also Bolton v. Scrivner, 36 F.3d 939, 943 (10th Cir. 1994), cert. denied, 513 U.S. 1152 (1995).

Barker fails to show that he was substantially limited in a major life activity. The mere fact that he has been diagnosed with allergies and a mental condition, and treated by health care professionals may be sufficient to establish a mental or physical impairment, but is not sufficient to establish that his impairments substantially limit one or more of his major life activities. See EEOC v. Sara Lee Corp.,237 F.3d 349, 352-53 (4th Cir. 2001). In this case,

Barker's psychiatrist actually wrote that it was important that Barker work normally. Barker has not presented evidence that he suffers from asthma. Barker's family care physician merely stated that Barker suffers from allergies to dust and should minimize his exposure to dust in the workplace (Defendant's Motion for Summary Judgment, Ex. 3). An allergy to dust or smoke does not amount to a disability under the ADA. See Gupton v. Virginia, 14 F. 3d 203, 205-206 (4th Cir. 1994)(holding that although plaintiff's allergy to tobacco made her unable to continue a specific job, it did not prevent her from finding other work), cert. denied, 513 U.S. 810 (1994). The inability to work a particular job or for a particular employer does not demonstrate that the employee is substantially limited in working generally. See Sutton v. United Airlines, Inc. 527 U.S. 471, 492-493 (1999); Nugent v. Rogosin Inst.. 105 F.Supp.2d 106, 113-114 (E.D.N.Y.2000). Further, Barker was able to work at other jobs prior to Mancor, even though he suffered from the same impairments. See Barker Dep. 10.

2. Record of Impairment

Barker also appears to allege that he has a record of impairment that substantially limits one or more of his major life activities. The ADA regulations define "a record of impairment" as has "a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more

major life activities." 29 C.F.R. § 1630.2(k); see also Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727-78 (5th Cir. 1995). Employment records containing information about an individual's impairment may satisfy the ADA definition of disability. 29 C.F.R. Pt. 1630 App. § 1630.2(k).

Here, there is no evidence that any restrictions of Barker's physicians disqualifies him from a class of jobs or from a broad range of jobs in various classes such that a record of impairment has been established. See Dotson v. Electro-Wire Products. Inc., 890 F.Supp. 982 (D.Kan.1995)(single note from physician, stating that the employee bad a disability which prevented hard physical labor, was insufficient to show a record of impairment).

3. Regarded As

Barker alleges that Mancor regarded him as disabled because Mancor accommodated his disabilities, and because his harassers believed him to be mentally and emotionally disabled. Mancor argues that its compliance with Barker's requests concerning his impairments fails to show that it regarded him as disabled.

Barker fails to establish that Mancor regarded him as disabled. For ADA purposes, "regarded as" merely means that the employer regarded the employee as having a substantial limitation on his ability to work in general. Chandler v. Dallas, 2 F.3d 1385, 1391-93 (5th

Cir. 1993), cert. denied, 511 U.S. 1011 (1994). The mere fact that an employer is aware of an impairment "is insufficient to demonstrate either that the employer regarded the employee as disabled [i.e., as having an impairment that substantially limits one or more of the major life activities of such individual] or that the perception caused the adverse employment action." Runnebaum v. Nationsbank of Maryland, N.A., 123 F.3d 156, 174 (4th Cir. 1997)(citing Kelly v. Drexel University, 94 F.3d 102, 109 (3d Cir. 1996)). Here, even if Barker can show that Mancor knew about his impairments, there is no evidence that Mancor perceived that the impairment substantially limited one or more of Barker's major life activities.

Mancor's accommodations do not establish that the company regarded Barker as disabled. Federal courts have held that an employer's decision to accommodate an employee or to place the employee on limited duty does not establish a "regarded as" claim under the ADA. See Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) (an employer does not necessarily regard an employee as disabled simply by finding the employee to be incapable of satisfying the singular demands of a particular job); Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995)(rejecting plaintiff's argument that he was perceived as disabled because he was restricted to light-duty work in certain settings); Muller v. Automobile Club of Southern California, 897 F. Supp. 1289, 1297 (S.D. Cal. 1995)(defendant's

efforts to accommodate plaintiff s safety concerns and help her find other work did not show that defendant regarded her as having a disability).

B. Harassment

Mancor argues that Barker cannot establish his hostile work environment claim. Barker argues that he has established each of the elements of a hostile work environment claim.

In order to establish a hostile work environment claim under the ADA, a plaintiff must establish: (1) he is a qualified individual with a disability; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his disability; (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and (5) some factual basis exists to impute liability for the harassment to the employer. Fox v. General Motors Com., 247 F.3d 169 (4th Cir. 2001).

1. Qualified Individual With.A Disabilitv

As noted above, Barker fails to establish that he has a disability under the ADA, and thus he fails to establish a prima facie case of harassment under the ADA.

2. Harassment based on Disabilitv

There appears to be a genuine issue of material fact as to whether the wrestling picture and Bull Street comment were based on Barker's anxiety and thus consisted harassment based on disability.

3. Severe

Mancor argues that the few comments which were made were not severe and pervasive. Barker argues that the abuse was severe and pervasive because of the wrestling picture Bull Street comment, and "crazy" comment, and because of the harassment of coworkers who he claims insisted on smoking in his work area.

Barker fails to show that the alleged abuse was severe and pervasive. He fails to show that the alleged smoking near him constituted harassment based on disability. The only instances of alleged abuse based on disability are the wrestling picture, the Bull Street incident, and a comment that he was crazy. This fails to rise to the level of severe and pervasive. See e.g., Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)(actionable sexual harassment occurs when the workplace is "permeated with discriminatory intimidation, ridicule, and insult.'); Robinson v. Montgomery Ward and Co., Inc., 823 F.2d 793, 797 (4th Cir.1987), cert. denied, 484 U.S. 1042 (1988)("occasional or sporadic instances of

the use of racial or ethnic slurs in and of themselves do not constitute acts of racial discrimination.").

4. Imputable

Barker also fails to show that the wrestling picture and Bull Street comments are imputable to management, as they were done by coworkers, not supervisors. Management counseled Barker's coworkers to not *smoke* near him and followed up with employees that Barker complained about. Estes Aff., Para. 3.

C. Failure to Accommodate

Barker alleges that Mancor violated the ADA by wrongfully denying his requests for reasonable accommodations under the ADA, specifically that Mancor failed to provide him with the accommodations of enforcing a no-smoking area around his workstation and allowing him to leave his workstation if his anxiety grew unbearable. Mancor argues that Barker's claim fads because he did not have a disability under the ADA, he never requested these accommodations, and even if he did that these accommodations were not reasonable.

To establish a prima facie case of discrimination under the ADA based on an allegation that the defendant-employer failed to provide a reasonable accommodation, a plaintiff must offer evidence establishing that:

(1) he has a disability within the meaning of the ADA; (2) he is a "qualified individual"; and (3) the defendant failed to make reasonable accommodations for the plaintiff s disability. Tyndall v. National Education Centers.Inc., 31 F.3d 2O9, 212 (4thCir.1994); 42 U.S.C. § 12101 et seq.

Barker fails to establish his prima facie case because he fails to show that he is disabled within the meaning of the ADA, as discussed above. Further, even if Barker was disabled under the ADA, Ma-ncor made reasonable accommodations and Barker fails to show that the contested accommodations, if they were requested, were reasonable. To accommodate Barker's allergies, a divider sheet was placed to isolate Barker's work station, the ventilation system was improved, and Barker was given the use of a dust mask. Estes Aff., Para. 3. "An employer is not obligated to provide an employee the accommodation he or she requests or prefers; the employer need only provide some reasonable accommodation." Crawford v. Union Carbide Corp., 202 F-3d 257, 1999 WL 1142346, *4 (4th Cir. Dec. 14, 1999), cert. denied, 530 U.S. 1234 (2000)(quoting Baert v. Euclid Beveraize, Ltd., 149 F.3d 626, 633 (7thCir.1998)). Estes states that the production lines require the presence of all people, and if someone walks off their job, that production will grind to a halt. Estes Aff., Para. 6. Thus, Barker's request to leave the work area whenever he wanted to cool down was

unreasonable because it would require Mancor to fundamentally alter the operation of its business and constitute an undue hardship. See 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.2(p); see also Buckles v. First Data Res., Inc., 176 F.3d 1098, 1101 (8th Cir. 1999)(stating that"[u]fettered ability to leave work at any time is certainly not a reasonable accommodation here."); Myers v. Hose, 50 F.3d 278, 282-83 (4th Cir.1995) (Wilkinson, J.) (reasonable accommodation provisions of the ADA do not require employers to "wait indefinitely," providing extended leave, while an employee's health improves); Carr v. Reno, 23 F.3d 525, 531 (D.C.Cir.1 994) ("[T]o require an employer to accept an open-ended 'work when able' schedule for a time-sensitive job would stretch 'reasonable accommodation' to absurd proportions.....); Kimbro v. Atlantic Richfield Co, 889 F.2d 8691, 878 n. 8 (9th Cir. 1 989) (employers legitimate needs rendered it unreasonable to require employer to allow employee to use accrued sick leave intermittently when employee's migraine condition precluded his ability to work), cert. denied, 498 U.S. 814 (1990).

D. Termination Based on Disabilily

Barker alleges that he was terminated based on his disability in violation of the ADA. Mancor argues that Barker fails to establish his prima facie case and that it has provided a

legitimate, non-discriminatory reason for its actions which Barker fails to show is pretextual.

In order to establish a prima facie case of wrongful discharge under the ADA, a plaintiff has to establish that: (1) he or she had a disability; (2) he or she was "qualified" for the job; and (3) be or she was terminated due to his or her disability. Tyndall v. National Education Centers, Inc. of California, 31 F.3d 209 (4th Cir. 1994).

As discussed above, Barker fails to establish that he was disabled under the ADA and thus fails to establish his prima facie case of wrongful discharge. Even if Barker could establish a prima facie case, Mancor has provided a legitimate, non-discriminatory reason for its action that Barker fails to show is pretextual. See Reeves v. Sanderson Plumbing Products, Inc.. 530 U.S. 133, 147 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). Mancor has provided that it terminated Barker for making threatening comments, one the production sheets and when he left the May 10, 1999 meeting. The ADA "does not require an employer to retain a potentially violent employee." Palmer v. Circuit Court of Cook County, 117 F.3d 351 (7th Cir. 1997), cert. denied, 522 U.S. 1096 (1998).

Barker argues that this reason is pretextual because workers who made threats to fight others were not terminated, the termination was procedurally illegitimate because the team leader was not part of the decision, there was no evidence that he was engaged in fighting, and

he did not make any direct threats. Barker fails to show pretext. He has provided no evidence that he was similarly situated to those employees who threatened to fight or that there

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8 Barker also argues that he was subjected to the adverse action of harassment. He did not allege this in his complaint (See Complaint, Para. 68). Even if this claim is properly before the court, Barker fails to show that harassment was an adverse employment action for retaliation purposes because he fails to show that it altered the terms, conditions, or benefits of his employment. The Fourth Circuit, in Von Gunten v. Maryland, 243 F.3d 858 (4th Cir. 2001), recently clarified what an "adverse employment action" is for purposes of a Title VII retaliation claim. Although "ultimate employment actions" are adverse employment actions, a Title VII retaliation claim does not require an ultimate employment action, but does require an action that alters the terms, conditions, or benefits of employment. Von Gunten, 243 F.3d at 865-866. An objective test of "adversity" applies, and a plaintiff s subjective feelings about the employment action is a necessary, but not a sufficient, evidentiary showing to withstand summary judgment. See Goldberiz v. B. Green and Co., Inc., 836 F.2d 845, 848 (4th Cir. 1 988). Even if Barker were able to establish a prima facie case of retaliation, he fails to show that Mancor's legitimate, non-discriminatory reasons for its actions were pretextual.

conduct was as severe as his. He fails to show that Mancor could not terminate him for threatening comments or that they did not perceive his comments as threatening. Finally, Barker fails to show that an employee must make a "direct 'threat before he can be terminated.

D. Retaliation

Barker argues that Mancor retaliated against him, by suspending and terminating him, for engaging in the protected activities of requesting accommodations, complaining of discrimination to his managers, and conveying a letter from Barker's attorney to Mancor on May 12, 1999.8 Specifically, Mancor argues that Barker fails to establish a prima facie case of retaliation because he fails to establish a causal connection between his protected activity and his termination.

To establish a prima facie case of retaliation, it must be demonstrated that:

1) the employee engaged in protected activity;
2) the employer took some adverse employment action against the employee; and
3) a causal connection existed between the protected activity and the adverse action.

Causey v. Balog, 162 F.3d 795, 803 (4th Cir.

1998); Carter v. Ball, 33 F.3d 450,460 (4th Cir. 1994).The burden of establishing a prima facie retaliation case" is not onerous." Burdine, 450 U.S. at 253.

If the plaintiff establishes a prima facie case, the burden shifts to the defendant to produce evidence of a legitimate, non-discriminatory reason for the adverse action. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). If the defendant meets this burden, the plaintiff must show by a preponderance of the evidence that the proffered reason was pretextual, and that his termination was motivated by discrimination. Reeves v. Sanderson Plumbing Prods., Inc., supra; see Duncan v. Commonwealth of. Virginia Dept. of Corrections, 2001 WL 565672 (4th Cir. May 25, 2001)(unpublished).

Here, Barker fails to show a causal connection between protected activities and the adverse job action. He began complaining about discrimination as early as September of 1997, and filed a complaint with the EEOC in December of 1998, yet the suspension and termination did not occur until May of 1999. In Garrett v. Lujan, 799 F. Supp. 198 (D.D.C.1992), the court observed that "[w]hile a causal nexus is inferred when the adverse employment action occurs shortly after participation in a protected activity," such inference is not appropriate when the time interval is too great. Id. at 202 (concluding that the passage of nearly a year precluded an inference of causal connection); see Parrott v.

Cheney, 748 F. Supp. 312 (D.Md. 1989) (even the passage of as little as five months between filing EEOC complaint and adverse action may be enough to negate causal connection in a particular factual context), aff'd per curiam, 914 F.2d 248 (4th Cir. 1990).

Even if Barker could establish a prima facie case of retaliation, Mancor has provided a legitimate, non-discriminatory reason for its action (that Barker was terminated for his threatening comments) which Barker fails to show are pretextual, as discussed above.

II. State Claim (Negligent Supervision and Recognition

Barker has also alleged a claim, presumably under South Carolina law, for negligent and reckless supervision and retention of employees. Mancor argues that Barker's claim is barred by the South Carolina Worker's Compensation Act.

This claim is based on South Carolina law and appears to be premised on supplemental jurisdiction. 28 U.S.C. § 1367(a). Since it is recommended that summary judgment be granted on Byrd's Title VII claims, it is recommended that discretion be exercised pursuant to 28 U.S.C. § 1367(c)(3) and that this remaining state law claim be dismissed,

Even if Barker's claim is considered, however, it is preempted under the South Carolina Workers Compensation Act

("SCWCA"). Claims by an employee against an employer that sound in negligence are barred by the SCWCA. Loges v. Mack Trucks Inc., 417 S.E.2d 538 (S.C. 1992). Barker acknowledges this bar, but argues that there is an exception for non-employees who are harmed because an employee negligently supervises its employees and allows them to commit foreseeable harm. This argument fails. First, Barker was an employee, not a non-employee at the time of the alleged incidents. Further, Barker simply fails to show that there is a cause of action under South Carolina law for negligent supervision because one's job was terminated.

CONCLUSION

Based on review of the record, it is, therefore, recommended that the defendant's motion for summary judgment be granted.

Respectfully submitted,

s/_____
Joseph R. McCrorey

August 6, 2001
Columbia, South Carolina

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 28, 2003

No. 01-2363
CA-00-1427

FRED BARKER, JR.

Plaintiff - Appellant

v.

MANCOR CAROLINA, INCORPORATED

Defendant - Appellee

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX E

WUKELA LAW FIRM

Steve Wukela, Jr.
Benjamin D. Moore
Susan J. Firimonte
Chalmers C. Johnson
Christi B. McDaniel
Lyndon B. Jones

403 Second Loop Rd.
P.O. Box 13057
Florence, SC 29504-3057
(843) 669-5634
(843) 669-5150

May 12, 1999

Mancore South Carolina, Inc.
Human Resources
Attn: Mary Ann Smith
397 A Highway 601 S.
Lugoff, SC 29087

Re: Suspension of Fred Barker

Dear Ms. Smith:

My name is Chalmers C. Johnson. I have been retained to represent Mr. Barker concerning possible claims under the Americans with Disabilities Act against Mancore.

I understand that Mr. Barker's requests for a designated non smoking area and for the

right to withdraw from his work station for momentary respites when his anxiety flares up have been denied, and that Mancore has been allowing other workers to taunt Ms. Barker concerning his disabilities with impunity. I also have just learned that Mr. barker has been suspended.

Please reinstate Mr. Barker immediately and have your legal department or attorney contact me as soon as possible. I hope that I have contacted you in time to avoid a wrongful termination, and I look forward to working out a reasonable agreement that will allow Mr. Barker to remain on duty at Mancore. I look forward to hearing from you soon.

Sincerely,

Chalmers C. Johnson

APPENDIX F

MANCOR

Mancor Carolina, Inc.
397-A Highway 601 South, Lugoff, SC 29078

May 14, 1999

Mr. Fred H. Barker, Jr.
1400 Bella Vista Drive
Lot #6
Columbia, SC 29223-7236

Dear Fred:

You made threatening comments on your Sampling Log Sheets on May 4, 1999 and May 7, 1999. On Monday, May 10 in a disciplinary meeting, your team leader warned you that another incident of this nature would lead to termination. During that disciplinary meeting, you made verbal threats. Because of these threats, you were sent home for five days with pay, starting May 10, pending a determination by the company as to what disciplinary action should be taken. According to our policy manual, threatening another team member is grounds for immediate disciplinary action, up to and including discharge.

By making these threats, you have caused Mancor to be concerned about the safety of its employees. Therefore, you are released from employment at Mancor immediately. Please return all company property, including tools, uniforms, etc. to Mancor as soon as possible.

Sincerely,

Curt Block
Team Leader

Chip Estes
Production Manager

Dilip Teppara
General Manager

Cc: Chalmers Johnson

A Division of Mancor Industries, Inc.

APPENDIX C